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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 10 CR 019

:

-against- :

ADIS MEDUNJANIN, : United States Courthouse  
Brooklyn, New York

:

Defendant. : March 22, 2011  
12:00 o'clock noon

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TRANSCRIPT OF CONFERENCE  
BEFORE THE HONORABLE RAYMOND J. DEARIE  
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH  
United States Attorney  
BY: DAVID BITKOWER  
JAMES LOONAM  
BERIT BERGER  
Assistant United States Attorneys  
271 Cadman Plaza East  
Brooklyn, New York

For the Defendant: ROBERT GOTTLIEB, ESQ.  
CELIA GORDON, ESQ.  
STEPHANIE CARVLIN, ESQ.  
MITCHELL DINNERSTEIN, ESQ.

1 Court Reporter: Gene Rudolph  
2 225 Cadman Plaza East  
3 Brooklyn, New York  
(718) 613-2538

4 Proceedings recorded by mechanical stenography, transcript  
5 produced by computer-aided transcription. THE COURT: Welcome  
6 back.

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12  
13 MR. BITKOWER: Thank you, Your Honor.

14 MR. GOTTLIEB: Thank you for having us.

15 THE CLERK: We are on this afternoon for a status  
16 conference. This is USA versus Medunjanin, docket number  
17 CR 10-019.

18 Can I ask the attorneys please to note their  
19 appearance, beginning with counsel for government.

20 MR. BITKOWER: For the government, David Bitkower  
21 and James Loonam.

22 Good afternoon, Your Honor.

23 THE COURT: Good afternoon.

24 MR. BITKOWER: And Berit Berger will be joining us  
25 momentarily as well.

1 MR. GOTTLIEB: Robert Gottlieb for Mr. Medunjanin,  
2 Your Honor.

3 Good afternoon.

4 THE COURT: Good afternoon.

5 MS. GORDON: Celia Gordon also for Mr. Medunjanin.

6 THE COURT: Ms. Gordon.

7 MR. DINNERSTEIN: And Mitchell Dinnerstein also for  
8 Mr. Medunjanin.

9 THE COURT: Good afternoon.

10 Welcome back.

11 MR. GOTTLIEB: Your Honor, we have Stephanie Carvlin  
12 on the phone.

13 THE COURT: All right.

14 MS. CARVLIN: Yes, Your Honor.

15 THE CLERK: Ms. Carvlin, can you hear us all?

16 MS. CARVLIN: Yes, I can.

17 Thank you.

18 THE COURT: The issue before the Court today, as I  
19 understand it, is the possible testimony of AUSA Knox. I have  
20 been favored with a number of letters, including overnight, on  
21 the subject.

22 Ms. Berger is now with us.

23 Is there anything anybody wants to add to all of  
24 this?

25 MR. BITKOWER: Not for the government, Your Honor.

1 MR. GOTTLIEB: Your Honor, with your permission,  
2 Ms. Carvlin is prepared to address any issues, certainly would  
3 be the person to kick it off, if you thought further  
4 discussion would be helpful.

5 THE COURT: You know, I don't, only because you have  
6 been very thorough in these presentations. I for one  
7 remain -- I realize the government has left open a question as  
8 to whether or not they will assert a privilege with respect to  
9 certain information. Separate and apart from that, I am  
10 unconvinced that testimony of AUSA Knox will add anything to  
11 this discussion. We had well tried legal issues before me.

12 The one fact that is I guess relevant to the  
13 question at all, of course, is not in dispute concerning  
14 Mr. Gottlieb's retention and his communication of this fact to  
15 the government as early as September. Yes, it may be in a  
16 sense, and it does read to some extent as a discovery  
17 mechanism. I am not as concerned about that as the fact that  
18 I don't see any material information coming to me that bears  
19 on the issues of Mr. Medunjanin's alleged or possible waiver  
20 of his Fifth Amendment rights once he was arrested.

21 I assume that given the bizarre state of affairs  
22 that transpired that January evening or afternoon, of course,  
23 there is going to be discussions between attorneys and clients  
24 on both sides of the aisle. No one on the law enforcement  
25 side expected Mr. Medunjanin to take the action he took.

1 Obviously, there is going to be a discussion, as indeed we've  
2 had some testimony, about what to do with him and whether he  
3 could be spoken to and so forth and so on.

4           With all due respect, I don't think an Assistant  
5 U.S. Attorney, Mr. Knox or anyone else, decides whether or not  
6 the action taken by the authorities in approaching  
7 Mr. Medunjanin, engaging him in conversation, administering  
8 warnings, taking waivers, whether that is kosher; that's my  
9 job. So I assume there is all sorts of back and forth between  
10 Assistants, whether it's Mr. Knox or others, and the agents  
11 about what to do in the wake of this rather bizarre incident.

12           I don't know that it speaks to the issue before me.  
13 In fact, the more I think about it, the less I am inclined to  
14 think it has any bearing whatsoever.

15           There is also something to the privilege -- I am  
16 glad we are sort of past the Touhy business. I quite agree  
17 with Ms. Carvlin's comment the last time, that if it were a  
18 question of depriving the defense of relevant and material  
19 testimony in a criminal setting -- and the courts of appeals  
20 that have spoken on this apply these regulations in a criminal  
21 setting -- there is no doubt in my mind that those regulations  
22 would give way, were that the situation, if there were  
23 relevant material information that we could glean from the  
24 testimony of this witness. I don't think Touhy would stand in  
25 the way. I don't see it.

1           The question is framed rather squarely. Fully  
2 knowing that Mr. Medunjanin was represented by counsel, the  
3 agents approached Mr. Medunjanin who appeared to be willing,  
4 if not anxious, to speak to them.

5           I am not going to go into the substance of what was  
6 said at the time because you've all asked for an opportunity  
7 to do further briefing. Although, I must say, I don't know  
8 what more briefing we can do on the point.

9           The question is, was that waiver knowing and  
10 voluntary? If it was, that ends the discussion.

11           The idea of giving license to the defense to call an  
12 Assistant U.S. Attorney, frankly, in the hopes that some jewel  
13 might fall in their laps, lending credence to a claim -- and I  
14 emphasize the word "claim" -- of outrageous government  
15 conduct, because there has been no such evidence of outrageous  
16 government conduct, in my view, I don't think justifies  
17 throwing somebody up on the witness stand in the setting of  
18 this case.

19           That's my view of it. I will amplify it in my  
20 written opinion.

21           MS. CARVLIN: If I can just respond briefly? I  
22 understand Your Honor's ruling.

23           I just want to make clear that what we'd be calling,  
24 or attempting to call Assistant U.S. Attorney Knox to testify  
25 to is not just with respect to the waiver with respect to our

1 other arguments about government misconduct, potential  
2 government misconduct here. Certainly it's absolutely true  
3 that it's the Court's decision or the Court's obligation to  
4 decide what happened here. We are not disputing that. In  
5 fact, we are encouraging that.

6 I am asserting that you need all of the facts in  
7 order to make that decision. And, as we have outlined, there  
8 are some facts that only with respect to not the waiver  
9 argument but the outrageous government conduct argument, the  
10 right to counsel argument, that only the United States  
11 Attorney Knox could provide.

12 THE COURT: I disagree. I think we have the  
13 evidence we need in the record.

14 To the extent that there is any currency in the  
15 argument that Mr. Knox could offer relevant evidence on the  
16 question, I have thought about it and thought about it and  
17 thought about it. Mr. Gottlieb did what a good lawyer does.  
18 He communicated the fact of his representation to the  
19 government early on, as a legal point. I don't know that  
20 there is any authority, in fact as I understand the  
21 authorities, it doesn't suggest that there can't be a valid  
22 Fifth Amendment waiver following a period of incarceration.

23 You make, I know, a series of sort of satellite  
24 arguments to the extent that various communications between  
25 Mr. Medunjanin and Mr. Gottlieb over the phone were tantamount

1 to an assertion of the Fifth Amendment right, Sixth Amendment  
2 right. I understand the argument. We will deal with them in  
3 turn.

4 I don't see anything to be gained from the testimony  
5 of Mr. Knox. As I said, we will talk more about it later.

6 The question is, where do we go from here?

7 MR. GOTTLIEB: Your Honor, on this same issue?

8 THE COURT: Yes.

9 MR. GOTTLIEB: With the Court's permission.

10 For example, just before we came into the courtroom  
11 today, I was handed a number of emails from Agent Azad, I  
12 believe, in one and another agent to Assistant U.S. Attorney  
13 Knox going back to September 25, 2009 regarding my contacts  
14 with the government, emails that then continue into January.

15 I think what Ms. Carvlin is getting to, and much  
16 better than I could as a matter -- in a legal argument, but  
17 only by calling a live witness under our system -- this is our  
18 view of it -- only by calling a live witness to put more meat  
19 on the bones if we are alleging -- it is an issue that  
20 ultimately Your Honor is going to have to find, one way or the  
21 other -- alleging that in light of all the circumstances, in  
22 light of the conversations with Mr. Knox, because we put in  
23 our proffer in our letter, it is not only that I am putting  
24 him on notice but then Mr. Knox responded to me in September  
25 of 2009 about what the government was representing they would



1 do as a result of my representation, and that being that they  
2 would not question my client.

3           So it is not enough just to say that I called and  
4 the government therefore was put on notice. But if we are  
5 really going to grapple with and understand the defense  
6 argument that there was outrageous government conduct here,  
7 wouldn't it be appropriate to hear what in fact the  
8 government's response was, what the government's  
9 representations were to me. And on January 7th, when we were  
10 desperately trying to find Mr. Medunjanin, was there, at best,  
11 a conscious avoidance by the government not to make contact  
12 with me, knowing that I am placing calls. As a maxim of  
13 federal law, conscious avoidance is heard constantly. It is  
14 not an absolute shield under all circumstances.

15           So if the government goes out of its way to avoid  
16 recognizing my request, insistence that he not be questioned  
17 on January 7th, wouldn't that fact, wouldn't all the history  
18 of it, wouldn't that be relevant in considering whether or not  
19 under all the circumstances of this case, knowing the back and  
20 forth, that can only come out through cross-examination from  
21 questioning a witness who is relevant.

22           We are not asking to call the President of the  
23 United States. We are not asking to call Mr. Holder or the  
24 US Attorney here in Eastern District.

25           We are asking to call, be permitted to call, a

1 witness who had all of those conversations directly with me,  
2 and that is the process by which we have accepted that the  
3 truth best can be brought out in a courtroom, through  
4 examination.

5 THE COURT: I don't know that any of the substance  
6 of these conversations as you relate them is in dispute.  
7 What's in dispute?

8 MR. GOTTLIEB: If there was --

9 THE COURT: What meat don't you have on the bone  
10 that we have already in the record?

11 MR. GOTTLIEB: Is the government prepared to  
12 stipulate that there was conscious avoidance knowing that I  
13 was -- no. I am not saying that sarcastically. Because  
14 that's exactly why we do have to call the witness. If the  
15 government was willing to say Mr. Knox knew that I was  
16 calling, spoke to an agent and said I am not going to return  
17 the phone call. Guys, do what you have to do. I don't know  
18 if that's what happened.

19 But knowing that I was calling, it is not a fishing  
20 expedition to go into what -- we know there were conversations  
21 between Mr. Knox and Agent Azad and perhaps others. So it is  
22 not a fishing expedition to now in the context of this hearing  
23 to elicit what were you told and what did you tell them  
24 regarding representation, whether or not to make contact with  
25 me.

1           Then we added, in our last submission, this issue of  
2 the CJA appointment. I know in the response that I just saw  
3 that apparently was sent to us close to midnight last night,  
4 but I just quickly looked at it, on January 7th, the day in  
5 question, after spending all day trying to get Mr. Knox, I  
6 receive a call from Mr. Knox late at night while I'm having  
7 dinner saying that he is --

8           MR. LOONAM: The eighth.

9           MR. GOTTLIEB: January 8th. I'm sorry. It would be  
10 January 8th, indicating that he's making plans to have a CJA  
11 attorney present at the arraignment tomorrow, which was going  
12 to be Saturday, and this is after the government is now  
13 informed by my client that he wishes to be represented by me.

14           So to have a full picture, so we could have a clear  
15 factual picture of everything that happened, why things were  
16 happening, why they were making efforts to get another  
17 attorney even after being told by Mr. Medunjanin he wanted me  
18 to represent him, in order to make that determination, Your  
19 Honor, as to whether or not the contact adds up to  
20 inappropriate outrageous conduct which would warrant a remedy,  
21 it's only by having that back and forth in the direct and  
22 cross-examination.

23           THE COURT: All well and good. I am not going to  
24 debate it with you.

25           You do raise a couple of interesting points. One is

1 remedy. Assuming there were any factual bases to suspect,  
2 much less find, outrageous government conduct, query, what the  
3 remedy would be that you would be entitled to. I don't know  
4 that it would be suppression of these statements.

5 Secondly, you segue into areas that are really the  
6 focus of the principal legal issue. But as long as you do, I  
7 found credible the statement that Mr. Medunjanin at one point  
8 expressed dissatisfaction with counsel. I am not suggesting  
9 for a moment he had any objective justification for that, not  
10 at all. But consider this. He had paid a fee. A period of  
11 time, not much had elapsed. There had been no arrests from  
12 his perspective. There will be a number of phone calls back  
13 and forth. There had been no meetings. And the retainer had  
14 been dissipated. Probably a pejorative connotation to that  
15 word. The retainer had been used up and now he's getting  
16 billed for additional monies.

17 We all know from our experience as practitioners how  
18 lay people sometimes react to legal bills and don't fully  
19 comprehend the value of our time or how much time we take  
20 along the way.

21 To me that made perfectly good sense. Because of  
22 that, and his expression of not wanting Mr. Gottlieb, which  
23 obviously later on he apparently about faced, he checked the  
24 box, I would have done the same thing, had CJA counsel  
25 standing by for an arraignment. The mere fact that they

1 maintain that position after the fact that he finally stated  
2 that he wished to speak with counsel is to me utterly  
3 immaterial.

4 As I said, the debate is over what do we do now?  
5 Where are we going?

6 Do you really need time to brief these issues?

7 MS. CARVLIN: Yes, Judge. I think we would like a  
8 briefing schedule. Obviously, I believe there is evidence in  
9 the record that may persuade Your Honor that fact -- --

10 THE COURT: I'm sorry. Say that again, please.

11 MS. CARVLIN: Yes.

12 I am saying, I think you do need a briefing  
13 schedule, Your Honor. I want to be able to point out evidence  
14 in the record supported by legal argument. As you say, this  
15 is not the time to get into the substance of the argument.

16 What I would suggest is it is time to set a briefing  
17 schedule.

18 THE COURT: I want to set a very tight briefing  
19 schedule. All of this is so fresh in my mind, I think all the  
20 relevant cases have been identified, perhaps not folded within  
21 the record. I understand your point. I will give you some  
22 time.

23 Ellie, where are we?

24 Can you get it in by April 1st?

25 THE CLERK: April 1st?

1 MS. CARVLIN: Is this going to be simultaneous, Your  
2 Honor?

3 THE COURT: No. Your motion, you make your  
4 submission. The government will respond and I will give you  
5 an opportunity for a very brief reply.

6 MS. CARVLIN: How about April 4th? That would give  
7 me an extra weekend.

8 THE COURT: I knew you were going to say that.  
9 April 4th. April 4th.

10 And Mr. Bitkower?

11 MR. BITKOWER: April 11th.

12 THE COURT: April 11th. Any reply, April 15th, tax  
13 day.

14 MR. GOTTLIEB: Your Honor, one request. In light of  
15 the decision that we are not going to be permitted to elicit  
16 certain information that we thought, quite frankly, we were  
17 going to be able to obtain from Mr. Knox, the --

18 THE COURT: I am getting paid to disappoint somebody  
19 every day, Mr. Gottlieb.

20 Go ahead.

21 MR. GOTTLIEB: And you have earned your fee, Your  
22 Honor, believe me.

23 THE COURT: Thank you.

24 MR. GOTTLIEB: Would Your Honor --

25 THE COURT: Did you say fee?

1 MR. GOTTLIEB: The pay, the pay.

2 THE COURT: Oh.

3 MR. GOTTLIEB: I will speak as an attorney.

4 THE COURT: I got excited there for a moment.

5 MR. GOTTLIEB: Would Your Honor permit a  
6 supplemental affidavit from me, specifically on the issue that  
7 was raised with regard to CJA, to complete the record here?

8 THE COURT: Fire away.

9 MR. GOTTLIEB: If I -- if I can be permitted to add,  
10 that we will at least be able to supplement to a certain  
11 degree the record as we think is appropriate.

12 THE COURT: You have my permission.

13 MR. GOTTLIEB: Thank you.

14 MR. BITKOWER: Just to add very briefly to that, the  
15 fact that we believe certain facts aren't legally relevant, I  
16 just want to make clear on the public record, does not  
17 indicate that we are agreeing with all of his representations.  
18 Obviously, there are steps that we took which we are  
19 comfortable with ethically and legally. There are certain  
20 allegations that may be made in an affidavit that we may or  
21 may not agree with. The fact that we choose to respond or not  
22 respond should indicate our lack of belief in their legal  
23 relevance but not necessarily adopting them as correct.

24 THE COURT: All right, sir.

25 When I get the briefs I will be back to you with a

1 ruling as quickly as possible.

2 Thank you and good day.

3 MR. GOTTLIEB: Thank you.

4 (Matter concludes.)

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